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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-923

CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY, a California non-profit corporation, THE SAN FRANCISCO, PENINSULA AND REDWOOD EMPIRE BUILDING INDUSTRY ASSOCIATION, a California non-profit corporation, PETALUMA PARTNERS, a California limited partnership, and WILLIAM LAWRENCE,
Petitioners,

vs.

THE CITY OF PETALUMA, a California Charter City, HELEN PUTNAM, ROBERT A. BRUNNER, JOHN W. CAVANAGH, ROBERT E. DALY, JAMES L. HARBERSON, FRED V. MATTEI, and WILLIAM A. PERRY,
Respondents.

PETITIONERS' REPLY BRIEF

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I. SUMMARY OF THIS REPLY BRIEF

This reply brief is limited to four points.

First. Respondents have denied that petitioners have personal standing, ignoring facts that led the court of appeals to state that petitioners "easily satisfied" the requirements for personal standing.

Second. Respondents' statement of the case makes unsupportable claims and contradicts district court findings left undisturbed by the court of appeals.

Third. Respondents rely on the court of appeals' commendation to the city for increasing multiple-family dwellings and for making provision for an annual allotment of low-income units among the 500-unit quota. In fact, the city concedes in the plan that low-income housing is an impossibility for private industry to produce without substantial, and no longer available, federal subsidies. The annual "low-income" allotment is merely a permissive element of the plan, which does not solve the problem of industry's inability to produce low-income housing.

Fourth. Respondents assert that no local land-use regulation should be measured by its effect on other communities in its region. This parochial position is symptomatic of the philosophy that has produced proliferating barriers to migration in many major metropolitan regions. Respondents defend their exclusion in the name of preserving Petaluma's small town character, ignoring the distinction made in both state and federal courts between growing cities in major urban areas and small towns already built to capacity or situated in rural regions with little demonstrable part to play in essential housing production.

II. RESPONDENTS HAVE CAST THE FACTS OF THE CASE IN SUBSTANTIAL CONTRADICTION OF THE DISTRICT COURT FINDINGS.

Respondents challenge petitioners' stake in this litigation as "really an alleged 'right' to build residential units wherever and whenever they choose, regardless of local land use regulations." [Respondents' brief at 6] Citing this court's decision in *Warth v. Seldin,* 45 L.Ed.2d 343 (June 25, 1975), respondents imply that petitioners lack the direct stake in the outcome of this litigation that supports personal standing and claim that petitioners are incompetent to represent the interests of housing consumers.[1]

The facts that support petitioners' direct standing are not difficult to find in the record. The Construction Industry Association demonstrated that the Petaluma plan's 1973 reduction in housing starts and its impact on property values on land owned by its members in Petaluma produced damages substantially in excess of the jurisdictional minimum [C.T. 250-251, 259-260, 270, 433] An officer of the association projected the loss to members of the Construction Industry Association over the ostensible life of the plan at seven million dollars, and the loss to the association itself in diminished dues from members was substan-

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[1]Although respondents also rely on *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), discussed in Part IV below, they overlook the holding in that case that the lessors had standing to represent the interests of their tenants, even though the tenants had since departed and were no longer involved in the litigation. While Justice Brennan dissented on the grounds of a lack of case or controversy, the majority held that the lessors' economic stake in the rental value of their house was sufficient to confer complete standing. 416 U.S. 1, 9-10.

tially in excess of the jurisdictional minimum. [C.T. 250-251, 433]

William Lawrence owns property at the northern outskirts of Petaluma, which in past years was open to development. [Plaintiffs' Exhibit 1-2] He was induced by the city to join a sewer district, increasing the taxes assessed to his property, and the assessor appraised his land as a potential subdivision. The Petaluma plan totally excludes his property from development for at least five years, leaving him an income from the property that is less than his taxes. Lawrence did not apply for an allocation for housing units under the Petaluma plan, because the plan prohibited the allocation. [C.T. 252-253; R.T. 164-165]

Petaluma Partners is a California limited partnership that owns property on the outskirts of Petaluma and that applied for an allocation under the Petaluma plan for fiscal year 1973, the year this litigation was filed. Petaluma Partners alleged that it met every reasonable and objective criterion for approval but the city refused the requested allocation, giving no reason for its disapproval. [C.T. 254-255, 270, 277]

Respondents have also been careless with the facts going to the merits of the litigation.

Respondents claim that the Petaluma plan is an effort by the city to "manage its *anticipated* residential growth" and "not an attempt to curtail or limit growth necessarily." [Respondents' brief at 19, emphasis added] The district court did not agree, finding that the plan "limited new housing units to approximately one-third to one-half of the demographic and

market demand of 1970-1971." [Petition, Appendix A at 4] The city intended the Petaluma plan "to exclude substantial numbers of people who would otherwise have elected to immigrate into the city." [Petition, Appendix A at 18; see also Appendix A at 3 and 7]

Likewise, respondents insist that the plan is only a five-year plan, although the trial court expressly found that the city had attempted to perpetuate the plan into 1990. [Appendix A at 10]

The court of appeals did not contradict the district court's findings. Instead it agreed that one of the purposes of the Petaluma plan was to "retard the accelerating growth of the City." [Petition, Appendix B at 38.][2] The court of appeals also accepted the district court's findings that the plan was designed to endure long past its nominal termination in 1977. [Appendix B at 38 n.1]

Although respondents state that the Petaluma plan was to be a "coordinated response to a broad range of pressing municipal concerns, *including the inadequacy of public facilities (principally water supply and sewage treatment facilities)*" [Respondents' brief at 2, emphasis added], no such problems were identified in any of the plan elements *(e.g.,* Plaintiffs' Exhibit 1-5 at 5-6). Only after this litigation was

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[2]The court of appeals questioned in passing the city's exemption from the plan of projects of four units or less [Appendix B at 39, 41-42], but assumed the trial court was correct in assessing the restrictive effects of the 500-unit limitation [Appendix B at 42]. The city always understood that, even exempting small projects, the plan would be effective to "roll back" the city's growth rate to the level of the 1960s. [Plaintiffs' Exhibit 1-5 at 2]

filed did respondents first suggest that water supply and sewage treatment facilities might be inadequate, a suggestion so repudiated by the evidence at trial that the district court found that it was an afterthought designed to justify the plan after its adoption. [Appendix A at 7-10; Appendix B at 41 n.5]

III. NEITHER THE CITY'S PROVISIONS FOR MULTI-FAMILY DWELLINGS NOR FOR TOKEN ALLOCATIONS EACH YEAR TO LOW-INCOME HOUSING OVERCOME THE CITY'S INTENT AND THE EFFECT OF ITS PLAN TO USE HOUSING SCARCITY AS A BARRIER TO NEW RESIDENTS.

The court of appeals did not challenge the trial court's findings on the demographic effects of the Petaluma plan. [Petition, Appendix A at 10-17; Appendix B at 42] Instead, the court identified the city's encouragement of a mix of housing types and the city's provision for an annual allocation for low-income housing as "inclusionary" aspects of the city's plan.

The court of appeals was in error in believing that the Petaluma plan required eight to twelve percent of the annual residential unit allocations to be for low or moderate-income families. [Appendix B at 55-56 n.16] The bonus points for this type housing were permissive, not mandatory, and the city recognized that it would be virtually impossible for the private market to supply this type of housing.

> It is important to realize that the private sector can no longer provide housing for this income group due to the fact that their lower incomes

> cannot meet the prices of the conventional housing market. As land, material, construction and perhaps even financing, rise over time, a greater proportion of Petaluma's older and younger population will not be able to exercise choice in the housing market. For these reasons, the city must begin to consider the Federal programs which offer financial assistance to families with insufficient incomes.
>
> It is also important to realize that this is not an instance of attracting "undesirables" into Petaluma by providing low and moderate-income housing. The problem exists among the city's own residents, especially those who have lived in Petaluma the longest.

[Plaintiffs' Exhibit 1-8 at 19-20]

This passage from the housing element shows that the city recognizes that no low and moderate-income housing will be created without federal assistance. Furthermore, the purpose of the provision for low and moderate-income units in the Petaluma plan is itself exclusionary, certainly in the sense that only present residents are provided for—and not enough units even for them—but in any event not those persons of low and moderate income who might wish to migrate to Petaluma.

When all has been said of the Petaluma plan, its macroscopic constraints on housing supplies, and its microscopic provisions for multiple-family units and potential allotments of low-income housing among the annual quota, one conclusion is clear. By appearing to encourage more desirable and necessary types of

housing while drastically reducing supply below demand, the city insured that potential residents would be excluded who could very much have used the variety of housing types that the city declined to permit the petitioners to produce.

How much low-income housing has been produced under the plan the record does not reveal, having been made in the plan's early days. If this Court desires that the record be brought current on this issue petitioners would welcome reference of the question to the federal master appointed by the district court, Ira Michael Heyman, Vice-Chancellor of the University of California at Berkeley and a noted land-use authority and environmental scientist in his own right.

IV. EXTRATERRITORIAL EFFECTS OF LOCAL LAND-USE REGULATION ARE LEGITIMATE ELEMENTS IN DETERMINING THE CONSTITUTIONALITY OF COMMUNITY LEGISLATION "FOR THE GENERAL WELFARE," JUST AS NEGATIVE EXTERNALITIES CREATED BY PRIVATE USE OF LAND HAVE READILY JUSTIFIED CONTROLS ON LAND USE BY TRADITIONAL ZONING AND OTHER TOOLS.

The city flatly asserts that "the validity of a local land-use regulation is not determined by its regional effect" [Respondents' brief at 15], a disquieting and regressive argument that the court of appeals appears to condone and that has unsettled even the city's environmentalist friends. See, *e.g.*, Comment, *How Slow Can You Grow? Ninth Circuit Upholds Constitutionality of Petaluma's Growth Control Plan,* 5 Envir. L. Rep. 10169 (July 1975).

The respondents pass off as distinguishable on their facts all of the decisions of state courts of last resort discussed in the petition and concentrate their argument on the contention that *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) controls here.

Respondents make an error in failing to distinguish between small towns that are either already fully developed or are isolated from urban centers and growing communities that are integral parts of metropolitan housing markets. This distinction has been made in both state and federal courts and should be obvious in any event. It is a distinction that makes Petaluma's "small town character," while no less a legitimate interest of its residents, only one element in the balance for a major suburban growth center like Petaluma.

Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972), in a thoughtful opinion by Chief Judge Coffin, explains very carefully the different considerations that govern land-use restrictions on housing in rural, second-home areas and major metropolitan suburbs.

> Appellant relies heavily on National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) [and other cases] for the proposition that Sanbornton may not use a zoning ordinance to avoid "the increased responsibilities and economic burdens which time and natural growth invariably bring." . . . This proposition, invulnerable in its cloak of generality, does not quite suit the present case. All these cases refer to an unnatural limitation of suburban expansion into towns in the path of population growth where a

too restrictive view of the general welfare was taken. Comment, 50 Journal of Urban Law 129 (1972). . . . These different problems of suburban and rural expansion, their scientific and legal analyses, and their appropriate solutions cannot so easily be equated. . . .

We are faced with "a local legislative determination that the general welfare will be promoted by exclusion of an unwanted use from a non-metropolitan community [which exclusion] is not likely to conflict with a regional need for local space for that use." [Note, 57 Iowa L. Rev. 126, 140 (1972)] . . .

Yet, though it may be proper for Sanbornton to consider the foregoing factors, we think the town has done so in a most crude manner. . . . [W]e have serious worries whether the basic motivation of the town meeting was not simply to keep outsiders, provided they wish to come in quantity, out of the town. We cannot think that expansion of population, even a very substantial one, seasonal or permanent, is by itself a legitimate basis for permissible objection. . . . Where there is natural population growth it has to go somewhere, unwelcome as it may be, and in that case we do not think it should be channelled by the happenstance of what town gets its veto in first. . . .

469 F.2d 956, 960-962.

The responsibilities of former rural communities finding themselves newly subject to an expanding metropolitan region has been considered in two recent New Jersey cases. In *Segal Construction Co. v. Borough of Wenonah,* 134 N.J. Super. 421, 341 A.2d

667 (1975), the court found that the borough was not a developing community under the distinction established by the New Jersey Supreme Court in *Southern Burlington County NAACP v. Mt. Laurel Township,* 67 N.J. 151, 336 A.2d 713, appeal dismissed, 46 L.Ed. 2d 28 (1975):

> As already intimated, the issue here is not confined to Mount Laurel. The same question arises with respect to any number of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas (and surrounding some of the smaller cities outside those areas as well) which, like Mount Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable further residential, commercial and industrial demand and growth. Most such municipalities, with but relatively insignificant variation in details, present generally comparable physical situations, courses of municipal policies, practices, enactments and results and human, governmental and legal problems arising therefrom. It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised.

336 A.2d 713, 717.

The borough of Wenonah closely resembles the village of Belle Terre in both land area and population.

The *Belle Terre* case never suggested that the village was part of a developing metropolitan area. Nor did Justice Douglas, writing for the court in *Belle Terre,* suggest that the exclusion of boarding houses and the like would be legitimate if practiced city-wide in a metropolitan area. The Belle Terre ordinance was held legitimate simply in the context of "a land-use project addressed to family needs." 416 U.S. 1, 9.[3]

V. MANY GROUPS, BUILDERS AND ENVIRONMENTALISTS IN EQUAL MEASURE, ARE IN FEAR THAT THE CHARACTERIZATION GIVEN THE MAJORITY OPINION IN WARTH v. SELDIN BY THE DISSENTS IN THAT CASE, COUPLED WITH THE OPINION OF THE NINTH CIRCUIT IN THIS CASE, WILL DISABLE THE FEDERAL COURTS INDEFINITELY FROM MAJOR TASKS OF CONSTITUTIONAL DIMENSIONS.

It is as much the dissenting opinions in *Warth v. Seldin, supra,* as the majority opinion in that case, that seem to make of *Warth* a case of non-justiciability rather than standing. Although the majority carefully limited its holding to the failure of the

[3]The majority opinion in *Belle Terre* inexplicably spoke of the right to travel as limited to "transients," thus ignoring the right of migration for permanent settlement. 416 U.S. 1, 7. The court of appeals repeated the *Belle Terre* reference to transients as though the court of appeals believed that permanent migration were no longer constitutionally protected. *Cf. Shapiro v. Thompson,* 394 U.S. 618 (1969).

That the right to travel is a valid and fundamental counterpoint to municipal limits on housing production was recently emphasized by a noted jurist, Justice Stanley Mosk of the California Supreme Court, in a speech to a major gathering of environmental lawyers. Speech of Hon. Stanley Mosk, ALI-ABA Environmental Law Course, San Francisco, February 5, 1976; text on file at Misuraca & Beyers, Santa Rosa, California.

Warth plaintiffs to establish a sufficient stake in the outcome of the case, the decision is being read, as the court of appeals here reads it, as defeating the opportunity to litigate land-use issues of constitutional scope in federal courts. See, L. Sager, *Burnt Bridges: Retreat of the Federal Judiciary from Land Use Litigation,* 27 ASPO Land Use Law & Zoning Digest, No. 11 at 7 (1976); R. Babcock, *On the Choice of Forum,* 27 ASPO Land Use Law & Zoning Digest, No. 6 at 7, 8 (1975); Comment, *How Slow Can You Grow? Ninth Circuit Upholds Constitutionality of Petaluma's Growth Control Plan,* 5 Envir. L. Rep. 10169 (1975).

The comment of the Environmental Law Reporter, a publication of the Environmental Law Institute, is representative of the concern even of those who favor the merits of the Petaluma plan.

> Despite its enlightened view of the permissible scope of the local police power to implement land use control measures and its implication that the Petaluma Plan does not abridge anyone's constitutional right to travel, two aspects of the Ninth Circuit's opinion are nonetheless troublesome. The first is the statement that prospective residents allegedly excluded from living in Petaluma by the city's growth control plan could challenge the plan's legality on their own behalf. Although the Ninth Circuit was referring to a right to travel claim, its statement also applies to equal protection and due process claims against an allegedly exclusionary land use ordinance. The problem, however, whether the suit is based on equal protection and due process or on right to travel, is that the standard hurdle constructed by Justice Powell

> for such challenges by non-residents in the recent Supreme Court decision in *Warth v. Seldin* is so high as to be almost insurmountable. . . .
>
> Although right to travel claims against local land use control ordinances should be rejected, prospective low income residents must be able to challenge on equal protection and due process grounds any local zoning or growth control ordinance which has exclusionary effects . . . to prevent municipalities, encouraged by *Petaluma,* from overstepping the proper bounds of the police power in implementing growth controls.

5 Envir. L. Rep. 10169, 10171-72.

When local governments commit constitutional violations that transcend political boundaries, they will find those boundaries thin insulation from the court's writ. *Milliken v. Bradley,* 418 U.S. 717, 755 (1974) (Stewart, J., concurring). The district court's opinion in this case, by making a disciplined attempt to show the interrelationship of the local and regional housing markets, built on *Milliken* toward a rule of law in this troubled area. But it cannot serve to provide the beginnings of a civilized rule to accommodate the environment and man if no court can find a plaintiff who qualifies to bring the issue to court.

Whatever might have been the suspicions of the court of appeals about the motives of the petitioners, whatever the pejoratives put on builders-qua-builders, and whatever may be said to find a builder unworthy to represent the interests of his consumers against mutual threats of housing constraints, one thing is clear. No one can say that the plaintiffs as builders

and land owners in this case inadequately or insensitively presented to the court both the legitimate rights of the city in its environmental concerns and the interests of the migrating American in search of that most basic of all commodities in a democratic society, decent housing. To say that builders lack standing to represent consumers, in the context of the facts developed in this case, is a mockery that makes the concept of standing a potent determent to the redress of grievances in the federal courts.

Respectfully submitted,

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February 10, 1976.